

Before The
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DEC 28 1999

~~FEDERAL COMMUNICATIONS COMMISSION~~
OFFICE OF THE SECRETARY

In the Matter of)

Request for Extension of the Sunset Date)
of the Structural, Non-Discrimination, and)
Other Behavioral Safeguards Governing)
Bell Operating Company Provision of In-)
Region, Inter-LATA Information Services)

CC Docket No. 96-149

**REPLY COMMENTS OF THE
COMMERCIAL INTERNET EXCHANGE ASSOCIATION**

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December 28, 1999

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SUMMARY

The comments filed by the Bell Operating Companies (“BOCs”) in response to the Request filed by the Commercial Internet eXchange (“CIX”) and the Information Technology Association of America (“ITAA”) (“Request”) to extend the structural, behavioral and other non-discrimination safeguards in Sections 272(b), (c), (d) and (g) provide little statutory or policy support for the Commission to allow the safeguards to sunset. In the wake of its approval of Bell Atlantic’s Section 271 application, the Commission can best comport with congressional intent and simultaneously protect the nascent market for broadband services by extending, for two years, the separate affiliate requirement for inter-LATA information services until the effects of BOC entry into this market can be assessed.

Contrary to the BOCs’ entreaties, the statute specifically endows the Commission with discretion to determine whether the structural protections Congress chose in 1996 are still necessary. The BOCs’ explanations of legislative intent are no more persuasive. It would be anomalous, indeed, for the BOCs’ intransigence in opening up their local markets to competition to be rewarded by allowing them to evade altogether the separate affiliate requirement for their inter-LATA information service offerings that Congress envisioned.

Nor are the BOCs’ predictions of the supposedly benign competitive effects of their entry into inter-LATA information services, absent structural safeguards, any more plausible. First, the BOCs’ argument that their current share of the Internet market eliminates any competitive concerns about BOC entry into inter-LATA information services ignores the continued control by BOCs of the local exchange networks even after they receive Section 271 approval. The BOCs’ anti-competitive incentives and ability to leverage this control into dominance of the inter-LATA information services markets are the proper points of inquiry. Filed comments of

the BOCs' competitors provide first-hand illustrations of the BOCs' anti-competitive tactics. Given the embryonic state of the broadband services market, these concerns of anti-competitive behavior are particularly worrisome. Given these risks, and the meager benefits promised by BOCs absent structural safeguards, the Commission should extend the separate affiliate requirements for two years, until the Commission has an opportunity to assess the competitive effects of BOC entry.

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.**

In the Matter of

Request for Extension of the Sunset Date of the Structural,)	
Nondiscrimination and Other Behavioral Safeguards)	CC Docket No. 96-149
Governing Bell Operating Company Provision of)	
In-Region, Inter-LATA Information Services)	

To: Chief, Common Carrier Bureau

**REPLY COMMENTS OF THE
COMMERCIAL INTERNET EXCHANGE ASSOCIATION**

The Commercial Internet eXchange Association ("CIX"), by its attorneys and pursuant to the Public Notice, DA 99-2736 (released Dec. 7, 1999, as corrected Dec. 9 , 1999), hereby submits its reply comments in the above-captioned proceeding.¹ Comments filed by the Bell Operating Companies ("BOCs") should do nothing to assuage the Commission that the substantial risks of anti-competitive behavior, and attendant risks to development of the broadband services marketplace, posed by imminent BOC entry into the market for in-region inter-LATA information services merit allowing the expiration of the structural and other safeguards contained in Sections 272(b), (c), (d) and (g) of the Communications Act of 1934, as amended (the "Act"), 47 U.S.C. §§ 272(b), (c), (d) and (g). To the contrary, the measure most consistent with statutory language and intent and the overarching Commission and congressional goal of fostering competitive deployment of broadband services, is for the Commission to grant

¹ The views expressed herein are those of CIX as a trade association, and do not necessarily reflect the views of each individual member.

the Request filed by CIX and the Information Technology Association of America ("ITAA") to extend for two years, until February 8, 2000, the structural, non-discrimination and other pro-competitive behavioral safeguards on BOC-provided in-region inter-LATA information services.²

I. INTRODUCTION

The Commission's grant of the Section 271 application of Bell Atlantic in New York state³ marks the first BOC entrant into the market for inter-LATA information services. How BOCs enter this market will undoubtedly have far-reaching effects on the deployment of broadband services. As Bell Atlantic prepares for the imminent roll-out of these services, and as other BOCs prepare to flood the Commission with their own Section 271 applications based on the Bell Atlantic model,⁴ the Commission is presented with a unique opportunity to give effect to the structure of and intent underlying the Section 272(f) structural separation requirements, enacted as part of the Telecommunications Act of 1996 ("1996 Act"), and thereby dramatically impact the development of the nascent market for broadband services.

By inserting a provision by which the Commission may extend the separate affiliate requirement beyond the February 8, 2000 date, Congress enabled the Commission to balance the potential harms posed by BOCs' anti-competitive incentives and control over local exchange

² Request of CIX and ITAA, CC Docket No. 96-149, filed November 29, 1999 ("Request").

³ *Application of New York Telephone Company (d/b/a Bell Atlantic New York), Bell Atlantic Communications, Inc., NYNEX Long Distance Company, and Bell Atlantic Global Networks, Inc. For Authorization To Provide In-Region, Inter-LATA Services in New York*, CC Docket No. 99-295, Memorandum Opinion and Order, FCC 99-404, (released Dec. 22, 1999).

⁴ See *Communications Daily*, December 23, 1999, at 3 (referencing impending BellSouth and SBC applications in Georgia and Texas, respectively).

monopolies against benefits to consumers from BOC entry in the inter-LATA information services marketplace without a separate affiliate. The Commission's fundamental choice in the instant proceeding is whether to adhere to congressional intent that BOC provision of inter-LATA information services occur through the tested mechanism of a structurally separate affiliate or whether BOCs will be allowed to evade structural separation without ever having complied with Congress' model.

Significantly, Bell Atlantic just recently agreed to the concept of a separate affiliate for its provision of DSL services in New York state. Chairman Kennard indicated that his concerns over Bell Atlantic's anti-competitive provisioning of DSL lines would have caused him to oppose granting Bell Atlantic's Section 271 application in New York, had Bell Atlantic not agreed to provide DSL through a separate affiliate.⁵ Notwithstanding the substantial concerns about the structure of Bell Atlantic's proposed DSL affiliate,⁶ the hypocrisy of Bell Atlantic's opposition to structural separation in the instant proceeding is apparent. The concerns that BOCs will behave anti-competitively in the inter-LATA information services market are no less acute and have no fewer significant consequences than the analogous risks to competition in their provisioning of digital subscriber line ("DSL") technologies. The Commission can best adhere to Congressional intent by applying the separate affiliate of Section 272 to BOC-provided inter-LATA information services for an additional two years, until the effects of BOC entry can be measured.

⁵ Communications Daily, December 23, 1999, at 1.

⁶ See CIX *Ex Parte* Letter, CC Docket No. 99-205, filed December 17, 1999.

II. EXTENSION OF THE STRUCTURAL SEPARATION SAFEGUARDS FOR BOCs' INTER-LATA INFORMATION SERVICE OFFERINGS BEST COMPORTS WITH THE LANGUAGE OF THE 1996 ACT AND CONGRESSIONAL INTENT

As shown in the Request, Congress envisioned that BOCs, once having obtained Section 271 approval, would be subject to the structural separation, non-discrimination and other behavioral safeguards contained in Section 272 for their inter-LATA information services offerings. The BOCs' almost uniform response is to claim that the text of Section 272 effectively precludes the Commission from taking the action urged in the Request. According to the BOCs, because the Section 272(f)(2) sunset provision establishes a four year period for the provision of inter-LATA information services through a specific affiliate, while the Section 272(f)(1) sunset of structural separation requirements for the provision of inter-LATA telecommunications services expire, absent Commission action, three years after the grant of Section 271 approval, Congress could not have attached any relevance for the Section 272(f)(2) sunset to when the BOCs received Section 271 approval.⁷ Indeed, several BOCs use strident language to attack the very filing of the Request as a "last minute" attempt at "gamesmanship."⁸ One BOC commenter even attempts to engraft a heightened burden of proof on the Requestors and their supporters.⁹

The BOCs' conclusory arguments fail both on the language and logical structure of the 1996 Act. First, while the BOCs profess adherence to the language of the statute, they ignore the

⁷ Opposition of SBC Communications Inc. at 4 ("SBC"); Opposition of US WEST Communications, Inc. at 3-5 ("US WEST"); Comments of Bell Atlantic at 2-4 ("Bell Atlantic"); Comments of BellSouth Corporation at 20-21 ("BellSouth").

⁸ SBC at 2, 3.

very provision giving rise to the Request. As a subset of the inter-LATA services for which Section 271 approval is required, inter-LATA information services have a direct link to the status of local telecommunications markets, notwithstanding the contrary assertions of BellSouth.¹⁰ The link could not be more explicit; only when a BOC receives Section 271 authority is it allowed in the market for inter-LATA information services.

Moreover, the language of Section 272(f)(2) explicitly grants the Commission discretion to assess whether sunset of the structural safeguards is warranted. Thus, the Commission may quickly dispense with BOC conclusions that the Request may be dismissed without a substantive inquiry. Further, BOC complaints of “gamesmanship” are equally unfounded. With Bell Atlantic receiving Section 271 approval on December 22, 1999, and making preparations to enter the market for inter-LATA information services through a separate affiliate, the Request could not be more timely.¹¹ And nowhere in the statute or legislative history is there any indication that the Commission must meet some elevated evidentiary threshold in order to retain the Section 272 safeguards.¹² Rather, the extension of the safeguards is within the Commission’s

(footnote continued from previous page)

⁹ US WEST at 2, 4.

¹⁰ BellSouth at 4 (“The status of local telecommunications markets is not relevant to the question presented here.”). As explained in Part III, *infra*, there is tremendous substantive relevance to the development of broadband services markets whether or not local telephone markets are open, even where a BOC has received Section 271 approval.

¹¹ CIX notes the hypocrisy of this complaint from the BOCs on the heels of the aforementioned Bell Atlantic offer to establish a separate affiliate for its DSL services in order to secure approval of its Section 271 application, which was made after comments were submitted by other parties on its application and slightly more than two weeks before Commission action on the application was required. See Letter from Thomas J. Tauke to William E. Kennard, CC Docket No. 99-295, December 10, 1999.

¹² CIX notes for the record the particularly misleading citation by US WEST to Commission precedent for the proposition that extending a sunset provision must involve some “unanticipated circumstance.” US WEST at 3-4, citing *Petition of Ameritech Corporation for Forbearance from Enforcement of Section 275(a) of the*

(footnote continued to next page)

discretion, based on its predictive analysis of the competitive effects of BOC entry into the inter-LATA information services markets.

Nor is the Request, as SBC argues, a plea to “reset the Act’s safeguards.”¹³ The 1996 Act specifically contemplates Commission review of the appropriate regulatory measures governing BOC entry into inter-LATA information services. This review will, of course, take into account the technological evolution of the telecommunications component and the corresponding migration of Internet subscribers from dial-up to DSL. Indeed, Congress in 1996 foresaw the need to build in a review mechanism under which the Commission could consider, among many factors, technological change, such as the significant impact of DSL.

Second, the BOCs’ explanations of Congressional intent underlying the Section 272 safeguards strain reason. According to the BOCs, it is perfectly plausible that Congress envisioned the anomalous occurrence of BOC intransigence in opening up their local markets to competition to be *rewarded* with the sunset of the Section 272 separate affiliate provision, *without it ever having been applied to a single BOC.*¹⁴ Thus, the BOCs’ position is that the separate affiliate requirement for BOC-provided inter-LATA information services was mere

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Communications Act of 1934, as amended, FCC 99-215, CC Docket No. 98-65 (rel. August 31, 1999). As the caption suggests, the referenced petition was a request for an *earlier* sunset for regulation of alarm monitoring services, where the statute contains no extension provision comparable to Section 272(f)(2). Here, CIX and ITAA simply ask the Commission for what is specifically contemplated in the statute.

¹³ SBC at 10.

¹⁴ The application of Section 272(f)(2) to Bell Atlantic, for example, between December 23, 1999 (the date of approval of Bell Atlantic New York’s Section 271 application) and February 8, 2000 (the date for sunset of structural separation for inter-LATA information services, absent Commission action) is so brief as to be effectively moot.

legislative surplusage. This position is indefensible as a matter of statutory interpretation and logic.

Examples of this illogical interpretation abound. For example, no BOC attempted to address substantively the existence of the biennial audit provision of Section 272(d) of the Act, which clearly indicates that Congress envisioned that BOC inter-LATA information service offerings would be subject to rigorous scrutiny before any consideration of the sunset of the separate affiliate requirement.¹⁵ The most logical explanation of Congressional thinking in 1996 in enacting Section 272(f)(2) is that the BOCs would open up their local markets to competition expeditiously and the Commission would have ample time to analyze, via the process of auditing separate affiliates, whether to allow the structural separation provision to sunset. The BOCs' recalcitrance has upset this expectation. Therefore, the most rational response is for the Commission to give effect to congressional intent and subject the BOCs' inter-LATA information service offerings to structural separation for two years, until those effects can be measured.

Far from weakening the case for extending the separate affiliate requirement,¹⁶ the Commission's opposition to structural separation as a means of curtailing the BOCs' anti-competitive incentives reinforces the assertion that Congress intended to apply such protections to BOCs' inter-LATA information service offerings. In spite of the Commission's decision in

¹⁵ See Request at 7-8; Comments of AT&T Corp. at 3 ("AT&T").

¹⁶ See BellSouth at 17-19.

1986 to lift structural separations for the BOCs in the *Computer III* order,¹⁷ Congress specifically imposed structural separation in the 1996 Act to address BOCs' anti-competitive incentives in the inter-LATA information services context. Therefore, to give effect to congressional intent, the Commission must ensure that the BOCs, simply by keeping their local exchange monopolies closed to competition, are not allowed to avoid the pro-competitive protections Congress specifically prescribed.

III. THE SUNSET OF STRUCTURAL SEPARATION THREATENS THE NASCENT MARKET FOR BROADBAND SERVICES

Beyond the statutory text and logical inferences of legislative intent, BOC attempts to dismiss the substantial concerns about the competitive effects of BOC entry into inter-LATA information services markets offer no assurances to the Commission as it considers whether to allow the sunset of the separate affiliate requirement. At this embryonic stage of development of the broadband market, the Commission must be particularly vigilant that any alteration of the regulatory landscape does not stunt the growth of broadband. Given this nascent state of the broadband market, and BOCs' well-documented anti-competitive incentives and conduct, the Commission can best foster an environment for competitive deployment of broadband by retaining the structural safeguards for two years, at which time there will be a substantive record of the effects of structural safeguards.

The BOCs' responses to concerns over the effect of BOC provision of inter-LATA information services is to deflect attention away from their continued dominance of local

¹⁷ *Amendment of Section 64.702 of the Commission's Rules and Regulations (Third Computer Inquiry)*, 104 FCC 2d 958 (1986) (subsequent history omitted) ("*Computer III*").

exchange markets, and the DSL input necessary to provide high-speed Internet services to consumers, and simply declare the broadband markets irrevocably open to competition and impervious to anti-competitive conduct. The BOCs cite the number of independent ISPs, the relatively small number of their own Internet subscribers, and even the openness of Internet protocols as sufficient grounds for the Commission to dismiss any concerns of anti-competitive effects of BOC entry.¹⁸

By focusing the Commission's attention on the current state of the broadband services market, BOCs are misdirecting the Commission's proper analysis. SBC's depiction of BOCs entering inter-LATA information services markets "from a standing start, with no customer base, no guaranteed revenue stream and little experience"¹⁹ either misleads the Commission or fundamentally misses the point. Analyses of the current state of Internet markets do not recognize that the nascent state of broadband means that a firm or group of firms could yet emerge as dominant. In addition, these analyses ignore the impact of BOCs' continued dominance of local exchange markets, even after Section 271 approval. As illustrated in the Request and as pointed out in the comments of the Telecommunications Resellers Association and AT&T, the Commission already has recognized that BOCs will retain the ability to dominate local telecommunications markets after the Commission certifies that their local markets are open to competitors.²⁰

¹⁸ See, e.g., Bell Atlantic at 9-10; BellSouth at 12-14; US WEST at 5-6; SBC at 8-9.

¹⁹ SBC at 8.

²⁰ Request at 5, n.4, citing *Implementation of Non-Accounting Safeguards of Section 271 and 272 of the Telecommunications Act of 1934, as amended*, CC Docket No. 96-149, FCC 96-489 (released Dec. 24, 1996), at ¶ 9. See also Comments of the Telecommunications Resellers Association at 4 ("TRA"); AT&T at 1-2.

It is evident, as US WEST recognizes, that DSL is a critical input required for independent ISPs and competitive providers to deliver Internet services.²¹ Therefore, BOCs' assertions that they are "minor players" now in providing Internet access,²² and do not exert substantial control over Internet content,²³ appear intended to deflect attention from the fact that BOCs will have the anti-competitive incentives and the means to exclude competitors from tomorrow's broadband markets because of their ongoing control over the local exchange networks. The four remaining BOCs control access to an existing customer base to whom they will be able to provide integrated services and from whom they can effectively exclude competitors. Because a substantial portion of high-speed Internet traffic will flow over the BOCs' local exchanges, their continuing control over the local exchange markets (and the DSL input, in particular) is particularly relevant.

The Commission need look no further than the many testimonials of the competitive local exchange carriers in this and related proceedings for evidence of BOC anti-competitiveness with respect to DSL. It is particularly ironic for the BOCs to cite to a Commission staff report noting the emergence of data CLECs,²⁴ when BOCs have, in Prism's experience, met "every step" of

²¹ US WEST at 5 ("The broadband services (i.e., DSL) market . . .").

²² BellSouth at 14.

²³ *Id.* at 8-10.

²⁴ *Id.* at 15, citing FCC Cable Services Bureau, *Broadband Today* (October, 1999) (referencing the development of Rhythms, Covad and Northpoint).

these companies' development "with incumbent resistance."²⁵ TRA and CIX members have experienced similar anti-competitive tactics in their respective markets.²⁶

The violations of the anti-bundling rules referenced in the Request²⁷ demonstrate the BOCs' willingness to act anti-competitively to further their own entry into the broadband market. Indeed, despite rules prohibiting the BOCs from bundling customer premises equipment ("CPE") with telecommunications services, several BOCs are violating the Commission's anti-bundling rules. The BOCs are "restricted [from] bundling CPE and advanced services with telecommunications service."²⁸ The BOCs are also "prohibit[ed] from offering 'package discounts,' which enable 'customers to purchase an array of products in a package at a lower price than the individual products could be purchased separately.'"²⁹ The most blatant example of BOC defiance of the prohibition on bundling CPE and telecommunications is Ameritech's current offering of free CPE with its SpeedPath 768 DSL service.³⁰ As noted in the Request, the

²⁵ Comments of Prism Communications Services, Inc. at 3 ("Prism").

²⁶ TRA at 6-8; Request at 8-11.

²⁷ Request at 10-11.

²⁸ *Policies and Rules Concerning the Interstate, Interexchange Marketplace, Implementation of Section 254(g) of the Communications Act, as amended*, CC Docket No. 96-61; *1998 Biennial Regulatory Review – Review of Customer Premises Equipment and Enhanced Services unbundling Rules in the Interexchange, Exchange and Local Exchange Markets*, CC Docket No. 98-183, *Further Notice of Proposed Rulemaking*, FCC Rcd 21531, ¶¶ 2, 13 (1998) ("*CPE/Unbundling FNPRM*"). See also US WEST at 6. ("[T]he BOCs have been able to provide Internet access, as long as that access is not bundled with an inter-LATA transmission component.").

²⁹ *CPE/Unbundling FNPRM* at ¶ 1.

³⁰ See <http://www.ameritech.com/navigation/site/1,1935,236,00.html> (December 27, 1999) attached hereto as Exhibit A.

Commission has held that such BOC pricing constitutes an anti-competitive practice because it unfairly disadvantages prospective competitors.³¹

These ongoing complaints of BOCs' anti-competitive behavior in satisfying requests for DSL provisioning, conditioning loops, and improper bundling have been voiced repeatedly to the Commission and contradict the benign scenarios sketched by the BOCs for their entry into in-region inter-LATA information services. With the broadband services market in its infancy and with the BOCs' ability to exert end-to-end control over the Internet, including choice of ISP and backbone provider, these anti-competitive tactics and motivations could have a devastating effect on competitive broadband development.

BOC attempts to tout the benefits of non-structural safeguards as adequate protections similarly offer little comfort to competitors in the broadband market who have experienced firsthand the BOCs' anti-competitive tactics. As an initial matter, it is hypocritical for BOCs to champion the Commission's rules promoting collocation, interconnection, line sharing and unbundling network elements³² when they have consistently opposed these measures at the Commission and in the courts. Second, as referenced above, there are repeated allegations from competitors that BOCs are acting anti-competitively in responding to competitors seeking access to their local exchange monopolies. Third, as explained in Part II, *supra*, while aware of the Commission's position in *Computer III*, Congress in the 1996 Act did not envision that structural safeguards would be adequate for BOC entry into inter-LATA information services markets. Fourth, as illustrated in the Request, the *Computer III* nonstructural protections do not contain

³¹ Request at 10, citing *CPE/Unbundling FNPRM*.

the absolute prohibition against discrimination against unaffiliated entities and have been significantly weakened.³³

Conversely, the BOCs overstate the costs of structural safeguards and the innovation and other consumer benefits that are supposedly to be gained from BOC entry into inter-LATA information services markets without structural separation. Bell Atlantic's vehement opposition to the merit and value of a separate affiliate requirement for inter-LATA information services while simultaneously offering to implement a separate affiliate to provide DSL services in New York reduces Bell Atlantic's credibility in the instant proceeding and casts serious doubt on whether their proposed separate affiliate for DSL contains meaningful protections against anti-competitive behavior. In any event, the paltry competitive benefits and innovation the BOCs promise, such as directory assistance, driving directions and concierge services,³⁴ do not outweigh the potentially damaging competitive effects of allowing BOCs to leverage their local exchange monopolies into the broadband services market. A balancing of these potential benefits and harms, as contemplated by Congress, indicates the necessity of extending the structural safeguards for two years, so that the actual effects of BOC entry into inter-LATA information services markets can be assessed.

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³² See, e.g., BellSouth at 21, US WEST at 9-10; SBC at 7-8.

³³ See Request at 17-18.

³⁴ US WEST at 11-12.

CONCLUSION

WHEREFORE, CIX respectfully urges the Commission to extend, for two years, the structural and other safeguards contained in Sections 272(b), (c), (d) and (g) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 272(b), (c), (d) and (g).

Respectfully submitted,

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A handwritten signature in dark ink, appearing to read "Ronald L. Plesser", is written over a horizontal line.

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I HEREBY CERTIFY, under penalty of perjury, that this 28 December, 1999, I caused a copy of these Reply Comments to be delivered by first-class mail, postage prepaid, to the following individuals:

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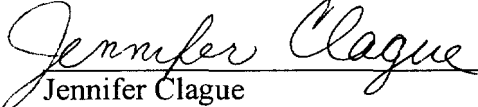
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